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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 888

FIRST NATIONAL BANK IN INDIANA, PENNSYLVANIA, Petitioner

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals on the remand of the cases from this Court is now reported in 241 F. 2d 455.

STATEMENT

The present petition for a writ of certiorari seeks the review of a judgment entered by the Court of Appeals for the Third Circuit, following the remand from this Court earlier at this Term, 352 U.S. 29, and after a rehearing before the entire bench of seven judges.

The suit is a civil action brought by respondent in the District Court to recover for the conversion of

$57,600 principal amount of 3% Series A bearer bonds of Home Owners' Loan Corporation. The bonds involved were part of a larger group of Home Owners' Loan bonds which had been purchased by respondent and which were stolen by sneak thieves in May, 1944 while they were being prepared by respondent's clerk for transmission for payment (R. 32-92). Notice of the loss or theft of the bonds, including the serial numbers of the bonds, was disseminated promptly throughout the United States (R. 93-114).

In September of 1948 the defendant Rocco turned over to another defendant, Parnell, who was a lawyer, $25,000 of stolen West Penn Power Company and United States Treasury bonds (R. 467-475). Parnell took them to the defendant-petitioner First National Bank in Indiana, Pa., and the bank, acting through its cashier, disposed of them and gave Parnell a check, which he immediately endorsed and surrendered for currency (R. 467-469, 479-480; 313-314, 348-349).

Eighteen days after this transaction, Parnell brought into the defendant bank $19,600 of the Home Owners' Loan bonds here in suit, and twenty-seven days later brought in the remaining $38,000 of bonds, all of which he had received from Rocco in Pennsylvania (R. 13-14, 303-306). These bonds had been called for payment in 1944 (R. 64) and eight overdue coupons, representing four years' interest, were attached to each bond (R. 175). In each instance Parnell dealt with the cashier, the same man as before, who knew that the Home Owners' Loan bonds had been called for redemption as of a date almost four and a half years earlier (R. 468-469, 313-314, 343).

The defendant bank sent the first group of Home Owners' Loan bonds to the Federal Reserve Bank branch in Pittsburgh for redemption (R. 153, 171, 334-337). The cashier telephoned Parnell when a credit advice was received from Pittsburgh, and Parnell thereupon went to the bank and received a cashier's check, which he immediately cashed at the bank, taking the proceeds in currency in bills of $100 and smaller (R. 316-319, 344). Parnell took the currency to his office, telephoned Rocco that it was there, and paid him in currency. No receipts were given for the bonds; in fact, there were no receipts, correspondence, checks or writings given or received by Parnell except cashier's checks, which he cashed immediately on receipt (R. 311-313).

The $38,000 of bonds involved in the last transaction were handled in the same way, Parnell dealing with the same cashier and turning the cashier's check into small denomination bills immediately upon its receipt (R. 318, 345).

The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the bank's cashier. The credibility of the defendant Parnell was impeached by his own prior inconsistent testimony in another proceeding (R. 472-478) and also by the testimony of an F.B.I. Agent (R. 319, 371-375) and of the defendant Rocco (R. 482-483, 489-492). The testimony of the cashier, Straitiff, is conflicting in itself (R. 345-346) and also in conflict with the testimony of F.B.I. Agent Myers (R. 345, 353, 381). His credibility was impeached generally by the introduction of the record of his conviction of embezzlement from the defendant bank (R. 390-393).

The jury returned verdicts against each of three defendants and in favor of respondent in the amount of $57,600 (R. 439), and judgments were entered thereon (R. 448). The defendants Gilbert S. Parnell and First National Bank in Indiana appealed. No appeal was taken by Arthur A. Rocco, the third defendant against whom judgment was entered.

The Court of Appeals for the Third Circuit, after argument on the appeals, ordered a rehearing before the entire bench of seven judges. After this rehearing the judgments appealed from were reversed and the cause remanded upon the opinion of a majority of four members of the court holding that the questions were to be decided under federal law and that under federal law the respondents were not required to establish their defense of good faith purchasers.

"Because the determination of the applicable law raised an important issue of federal-state relations", 352 U.S. 32, this Court granted certiorari on a petition filed by the present respondent. After hearing argument the judgments were reversed by this Court and the cases remanded to the Court of Appeals. The cases were heard again by the entire bench of seven judges and the judgments entered by the District Court affirmed upon an opinion by Circuit Judge Goodrich speaking for a unanimous court.

ARGUMENT

I.

The Decision Below Raises Solely a Question of Pennsylvania Law

When this case was previously before the Court of Appeals, there was a question whether the rights of the parties were to be decided by (a) a uniform Federal law, or by (b) the law of Pennsylvania. The Court of Appeals, in its first decision, held that Federal law was applicable, and decided that, under Federal law, the burden of proving bad faith was on the present respondent. The Court then clearly indicated its opinion that the other result would have been reached if the law of Pennsylvania was applicable. Otherwise, there would have been no need to choose between Federal and Pennsylvania law.

The case then came to this Court, which held earlier this term, 352 U.S. 29, that the matter was governed by state law. This Court remanded the case to the Court of Appeals, saying (352 U.S. at 34): "The Court of Appeals has not decided what the governing state law on burden of proof is, and it is the Court which should so decide."

The Court of Appeals has now made that decision. Thus, it has complied with the directions of this Court. There is nothing in its decision which requires further review here. Cf. *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280; and *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-630.

II.

The Decision Below Is Correct, and Presents No Conflict With the Law of Pennsylvania

That the decision of the Court below on the question of burden of proof is in accordance with the law of Pennsylvania can be readily seen.

Reference may first be made to Section 59 of the Negotiable Instruments Law (Pa. Stat. Ann. Title 56, Section 139), which reads as follows:

> "Burden of proof when title is defective.
>
> "Every holder is deemed prima facie, to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

The Pennsylvania Supreme Court has held in an unbroken line of cases extending over many years that under this Section a party defending against an action on the ground that he is a holder in due course, or asserting a right to recover because he is such a holder, must prove all the elements necessary to constitute him such a holder once it has been shown that the title of any person who has negotiated the instrument was defective. The most recent case so holding appears to be *Brubaker v. Berks County*, 381 Pa. 157, 112 A.2d 620 (1955).

Section 59 was also construed in *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337, 17 A.2d 377 (1941), which, like the case at bar, was an action by the owner of stolen bonds to recover from a lawyer and a bank alleged to have converted them. We quote from the opinion, 340 Pa. 340:

> "It was incumbent upon plaintiff to prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities under such circumstances as to relieve them from liability for a conversion. Plaintiff, however, itself presented all the facts through cross-examination of Goldberg, and is bound by his testimony, there being no contradiction of it: Krell v. Jacobson, 314 Pa. 522, 527, 172 A. 697, 699. From that testimony no inference of bad faith on the part of either defendant can be drawn."

The Pennsylvania Supreme Court in the Goldberg case approved the entry of a judgment n.o.v. by the trial court, but this in no way detracts from the authority of the case with respect to the Pennsylvania rule on burden of proof. As the second sentence of the quoted portion of the opinion clearly shows, the entry of a judgment n.o.v. was approved solely because the defendant's good faith had ceased to be a jury question under the familiar Pennsylvania rule that when one party calls the other party as for cross-examination he is bound by the testimony elicited in the absence of contradiction by other testimony.

In the present case, however, the testimony with respect to the conduct of the parties and the other

circumstances bearing on the petitioner's good faith was supported by, and depended solely upon, the oral testimony of petitioner's witnesses. In addition, the facts relied upon in the *Goldberg* case are so different as only to emphasize the inadequacy of petitioner's evidence with respect to its innocence and good faith.

Under the Pennsylvania law, the burden of proof on the issue of good faith was on the petitioner. This rule was correctly stated in the charge of the trial Court in the following terms (R. 422):

> ". . . if you find in this case that the plaintiff owned these bonds, that they were stolen from it—then the burden of proof so far as this plaintiff is concerned is to show that fact, that these bonds were owned by it, that they were lost by it in the manner as shown by its evidence. Then the two defendants, Parnell and the bank, not claiming to be owners for value, but as conduits for redemption, must come forward and they then have the burden of showing that they acted innocently, honestly, and in good faith."

On the basis of this charge, the jury found a verdict against the petitioner (R. 439). The petitioner throughout its Brief fails to differentiate between the burden of proving bad faith, which is not an element in this case under the law of Pennsylvania, and its own burden to prove good faith. This the jury and the Court below have both held that it did not meet.

CONCLUSION

The decision below involves solely a question of Pennsylvania law. The decision of the question of Pennsylvania law is correct. No question is raised by the petition warranting review by this Court.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The import to Pennsylvania banking policy, at the risk of excessively advocating our cause, dictates that we call this Honorable Court's attention to certain essential legal considerations which the opposition brief totally ignores —they are unanswerable:

First: The opposition, as well, the instant opinion of the Court of Appeals, entirely ignores the fact that in *First National Bank, Aplnt. vs. Goldberg and Land Title Bank and Trust Company,* 340 Pa. 337 (1941), the Supreme Court of Pennsylvania directly qualifies the only sentence upon which the Respondent attempts to stand wherein the Pennsylvania Court states, "• • • it is not enough to show

that he took them under circumstances which ought to excite the suspicion of a prudent man". They do not deny that the Goldberg Case is the law of Pennsylvania, they do not distinguish it, nor will they admit to follow it. Such cannot be reconciled for the just result of Goldberg, would be disastrous to their cause.

Second: We would respectfully quote the clear closing language of the Goldberg Case, entirely unanswered in opposition to sustain that which is admittedly the law of Pennsylvania:

> "It would seem strange if the broker, who is thus the conduit of a valid title, should be held responsible for a conversion although he acted in the same good faith as the purchaser. In the present case, defendants did not part with value for the bonds, but they do not claim any right, title or interest therein as holders; they derived no benefit from the transactions, acting merely as agencies to place the bonds in the hands of brokers for sale and to transmit the proceeds in return. The purpose of the Negotiable Instruments Law is to enhance the marketability of such securities and to allow bankers, brokers and people generally to trade in them with confidence. That object would be defeated if liability were to be imposed upon one who, mistakenly but in good faith, deals with negotiable instruments on the assumption that they belong to the person who employs him to effect their sale through ordinary market channels."

In the past, banks of Pennsylvania, acting under the law of the Goldberg Case, were assured that, in such non-profit, or nominal profit services, acting as a transfer agent for collection of negotiables, unless there were *mala fides* shown, they would not be held. Upon this they were willing to aid customers and parties known to them, to avoid the complications of that individual's identification to and direct correspondence with Reserve Banks, Registrars and

other transfer agents in other cities and in other states. It would not be so, if recovery would be permitted against them on a negative case. They would abandon such important services which yield nothing to them in profit. Such is not the law of Pennsylvania.

Thus, therefore, we respectfully request that this Honorable Court grant certiorari.

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